Supreme Court, U. S.
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1977

No. 77-1600

GILLRING OIL COMPANY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Gillring Oil Company (Gillring) hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on February 6, 1978.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been officially reported. The opinion appears in Appendix A to this Petition. The orders of the Federal Power Commission[1] have not yet been officially reported. They appear in Appendix B and C to this Petition, respectively.

JURISDICTION

The judgment of United States Court of Appeals for the Fifth Circuit was entered February 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and § 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Whether Gillring was improperly denied the benefit of the just and reasonable rate set by the Commission in calculating refunds.

STATUTES INVOLVED

Sections 4 and 19(b) of the Natural Gas Act, 15 U.S.C. § 717(c) and § 717r(b) are set forth in Appendix D to this Petition.

STATEMENT

Gillring sells gas in interstate commerce to Tennessee Gas Pipeline Company (Tennessee) from certain acreage in the Agua Dulce Field, Nueces County, Texas, pursuant to a gas purchase contract entered into July 22, 1948.

[1] On October 1, 1977, the Federal Energy Regulatory Commission succeeded to the functions and duties of the Federal Power Commission under the Natural Gas Act (Department of Energy Organization Act, 91 Stat. 565 (1977), 42 U.S.C. § 7107). References to the "Commission" in this Petition are to both agencies.

Subsequent to commencement of sales to Tennessee pursuant to such contract, the Supreme Court held that the Commission was required under the Natural Gas Act to regulate the rates at which producers sold gas to pipelines for resale in interstate commerce. *Phillips Petroleum Co.* v. *Wisconsin*, 342 U.S. 672 (1954). The Commission initiated various area rate proceedings in which it set just and reasonable rates applicable to all producer sales in a certain geographic area.

In 1971 the Commission issued Opinion No. 595[2] in which it set just and reasonable rates for sales of gas for resale in interstate commerce in the Texas Gulf Coast Area.[3] In addition, the Commission ordered that refund reports be filed for past periods, if the producer had incurred a refund obligation under the terms of Opinion No. 595. Gillring's report covered the period from November 1959, some *12 years* prior to issuance of Opinion No. 595, to May 2, 1971. In Opinion No. 595 the Commission directed that the refund reports contain the following information:

> (i) The rates collected during the period subject to refund and the periods during which each rate was collected.
>
> (ii) The volume of gas sold at each rate.
>
> (iii) *The difference between the total amount collected during the period subject to refund and the amount that would have been collected at the applicable area rate* as defined herein subject to the proviso of ordering paragraph (B).
>
> (iv) The computation of the applicable area rate and the basis for any difference between it and the base area rate.

[2] 45 FPC 674 (1971), Order on Rehearing, 46 FPC 827 (1971).

[3] The Texas Gulf Coast Area consists of Texas Railroad District Nos. 2, 3 and 4, plus certain counties in Texas Railroad District No. 1, and the underwater continental shelf offshore from these districts.

(*emphasis supplied*).

Gillring filed a refund report it thought to be in compliance with the foregoing provisions of Opinion No. 595; however, because Gillring had offset amounts collected in excess of the area rates (overcollections) by the difference between the area rates and actual amounts collected below the area rates (undercollections), the Commission advised Gillring to submit a new refund report.

Gillring believed that Opinion No. 595 clearly directed producers to offset undercollections against overcollections in calculating refunds. Accordingly, Gillring petitioned the Commission on May 24, 1976 to issue a declaratory order so stating and, in the alternative, requested relief from its refund obligation in part or in total. In support of its request for partial relief, Gillring pointed out that the consumer would pay no more than the just and reasonable rate, while Gillring would have the full benefit of such rate for exploration for and development of gas reserves. Further, Gillring pointed out that it had collected rates below the minimum rate which a producer could collect without contractual authorization that the Commission now considered necessary to induce expenditure of additional funds to maximize production.[4]

The Commission issued a declaratory order on November 29, 1976, denying both requests. The Commission stated that the terms of Opinion No. 595 did not allow Gillring to utilize the offsetting procedure in computing its refund obligation. (App. B-4). In addition, the Commission held that it would be inconsistent with the so-called "filed rate doctrine" to grant Gillring's request. (App. B-4). The

[4] Opinion No. 749, Docket No. R-389-B, issued December 21, 1975; Opinion No. 749-A, issued February 20, 1976; Opinion No. 749-B, issued March 31, 1976, and Opinion No. 749-C, issued July 19, 1976, *aff'd Tenneco Oil Co.* v. *FERC*, No. 76-2960, et al (5th Cir., April 18, 1978).

Commission denied Gillring's request for relief from its refund obligations, stating that (1) if Gillring needed funds for exploration and development, it could have reduced or eliminated its refund obligation by dedicating additional reserves to the interstate market as provided in Opinion No. 595, and (2) summarily concluded that Gillring's case for relief on grounds of financial hardship did not merit such relief. (App. B-6).

Gillring filed an application for rehearing on December 29, 1976. The Commission denied rehearing on January 28, 1978, agreeing with Gillring that the Commission is not required by the Natural Gas Act to order refunds in every case. (App. C-2). However, the Commission summarily concluded that "it is appropriate to require refunds in the instant proceeding." (App. C-2). Additionally, the Commission stated that the fact that Gillring had at all times collected rates below the minimum rate set in Opinion No. 749, the order setting nationwide rates for "old gas,"[5] was "immaterial". (App. C-3). Finally, the Commission adhered to its previous decision of November 29, 1976 on all other points. (App. C-3).

Gillring appealed the orders of the Commission to the United States of Appeals for the Fifth Circuit. On review, that court affirmed the Commission. The court conceded that Gillring's interpretation of the refund provisions of Opinion No. 595 "has some vitality. . ." (App. A-5). Nevertheless, the court affirmed the Commission's interpretation that Opinion No. 595 did not permit offsetting in calculating refunds. (App. A-5). As to the equities, the court again conceded Gillring's point; i.e., that under the Natural

[5] Generally, "old gas" is gas produced from wells commenced prior to January 1, 1973. Opinion No. 595 covered such gas; Opinion No. 749 supersedes Opinion No. 595 on a nationwide basis.

Gas Act the Commission had the power to order refunds in whole, in part, or not at all. (App. A-6). Nevertheless, the court affirmed the Commission's decision to deny Gillring the full benefit of the just and reasonable rate in calculating refunds in the face of Gillring's claims that the consumer would still be paying only the "just and reasonable" rate set by the Commission in Opinion No. 595, that Gillring as a small producer was in need of additional capital for exploration and development, and that Gillring had at all times collected rates below the minimum rate established in Opinion No. 749. (App. A-6).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is Clearly Inconsistent With The Plain Meaning of Opinion No. 595.

The court below conceded that Gillring's interpretation of the refund provisions of Opinion No. 595 had "some vitality." Indeed, Gillring's interpretation is based on the plain language of Opinion No. 595: the refund is to be measured by "the difference between the total amount collected during the period subject to refund and the amount that would have been collected at the applicable area rate ...." The "amount collected" would clearly include undercollections, as well as overcollections. These are to be measured against the "amount that would have been collected" — the just and reasonable rate — in order to calculate refunds. Any other interpretation is plainly inconsistent with the language used by the Commission. In light of the Fifth Circuit's concession and the plain meaning of the refund provisions of Opinion No. 595, further review by this Court is warranted.

II. The Decision Below Presents Questions Of General Importance Regarding The Commission's Power To Order Refunds Under The Natural Gas Act.

It is firmly established that the Commission is not required under the Natural Gas Act to order *any* refunds, even though a producer has collected amounts in excess of the just and reasonable rates set by the Commission. *Continental Oil Co.* v. *FPC*, 378 F.2d 510, 532 (5th Cir. 1967), *cert. denied*, 391 U.S. 917 (1968); *Placid Oil Co.* v. *FPC*, 483 F.2d 880, 905 (5th Cir. 1973), *aff'd sub nom. Mobil Oil Corp.* v. *FPC*, 417 U.S. 283 (1974); *In Re Hugoton-Anadarko Area Rate Case*, 466 F.2d 974, 990-91 (9th Cir. 1972). The effect of the decision below is to completely remove as an appropriate consideration in determining whether to order refunds and the amount of refunds to order the just and reasonable rates established by the Commission, even though such just and reasonable rates represent the Commission's determination of the rate which will best serve both consumers and producers and even though there is a natural gas shortage in the United States.[6] Indeed, the just and reasonable rate was used as a factor weighing *against* Gillring's request to offset undercollections against overcollections.

The court below justified this result on the basis of the "ceiling rate concept," "the filed rate doctrine," the refund work-off provisions of Opinion No. 595 and "plain arithmetic." Gillring submits that mechanistic application of these factors in this case is erroneous, fails to take into

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[6] "The Commission faces, on the one hand, a need to protect consumers from monopolistic price exploitation in a time of soaring energy costs, and, on the other, the sure knowledge that unless producers are guaranteed an adequate return consumers will find themselves without gas at any price."

Tenneco Oil Co. v. *FERC*, *supra* at footnote 4. *Accord, Placid Oil Co.* v. *FPC*, 483 F.2d 880 (5th Cir. 1973), *aff'd sub nom. Mobil Oil Corp.* v. *FPC*, 417 U.S. 283 (1974).

account the purpose of the just and reasonable rate, and deserves consideration by this Court.

As regards the "ceiling rate concept," the court below explained that the Commission set rate ceilings, not contract prices.[7] (App. A-3). In the first place, the issue in the case is the appropriateness of looking to the just and reasonable rate in determining refunds, not contract prices. Secondly, Gillring has made no contention whatsoever that its bargain with Tennessee should be abrogated. As a matter of fact, Gillring's contract on file with the Commission contained a clause allowing it to collect whatever rate Tennessee paid any other producer in a certain area for gas. Had the industry been able to predict twelve years before the fact the rate the Commission would set in Opinion No. 595, producers, including Gillring, could have been entitled to the rates set in Opinion No. 595. To utilize the delay to Gillring's detriment is highly inequitable.

The same applies to the so-called "filed rate doctrine." Under this doctrine, a producer is not entitled to a rate as a legal right unless the producer has filed for such rate. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). Again, Gillring could have and would have made a filing had the industry been able to predict far in advance the Opinion No. 595 just and reasonable rate. Further, reliance on the "filed rate doctrine" is in this case in conflict with the numerous decisions cited above (and cited by the court below) holding that the Commission has the power to decline to order refunds in whole or in part.

Thirdly, the court's reliance on the refund work-off provisions assumes that gas is easy to find. That is not the

[7] The Commission has, in several rate cases, established minimum rates which a producer may collect in the absence of contractual authorization. *See e.g., Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

case. As pointed out in Gillring's original filing in the Commission, Gillring has spent substantial amounts in an effort to find gas. The fact is not every well finds gas.

Finally, the "plain arithmetic" shows that if Gillring prevails the interstate gas consumer will receive the full benefit of the just and reasonable rate — the lowest rate consistent with the need of the industry for adequate capital to find gas for the consumer.

In light of the fact that the just and reasonable rate represents a balance of consumer and producer interests, the question of whether the Commission must consider the just and reasonable rate in favor of producers in ordering refunds is a question of general importance relative to the Commission's refund power under the Natural Gas Act which has not been, but should be, settled by this Court.

CONCLUSION

WHEREFORE, Gillring Oil Company requests the Court to grant this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FIFTH CIRCUIT

No. 77-1664

GILLRING OIL COMPANY, PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

Feb. 6, 1978

Petition for Review of an Order of the Federal Energy Regulatory Commission.

Before BROWN, Chief Judge, and GODBOLD and RONEY, Circuit Judges.

RONEY, Circuit Judge:

In 1971, Federal Power Commission Opinion No. 595 established ceiling prices for the sale of natural gas in the Texas Gulf Coast Area for each year back to 1959. The Commission ordered Gillring Oil Company, which had charged prices in excess of those ceilings during 1960-1968, to refund the excess. Gillring brought a declaratory action seeking to offset the refund by the extent to which the rates it charged during 1959-60 and 1968-1971 were below the allowable ceiling. The Commission denied Gillring's request, and this review proceeding followed. Deferring to the Commission's reasonable construction of Opinion 595, and to its discretion in considering the equities of a refund order, we affirm the Commission's decision.

Area Rates

Opinions No. 595, 45 F.P.C. 674 (1971), and No. 595-A, 46 F.P.C. 827 (1971), *affirmed, Public Service Commission* v. *FPC,* 170 U.S.App.D.C. 153, 516 F.2d 746 (1975), had their genesis in the Supreme Court's landmark decision, *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954). In that case the Court, by finding that the Commission had a statutory duty to regulate the rates of some 3,000 independent producers of natural gas, thrust on the Commission a task it was then unequipped to handle. *See Permian Basin Area Rate Cases,* 390 U.S. 747, 756-758, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968). To expedite its docket, the Commission largely abandoned individual ratemaking, and began setting prices according to geographical areas. In 1968, the Supreme Court upheld the first area rate case to reach it. *Permian, supra.*

The contract involved in this dispute came into existence in 1948. After the *Phillips* decision, Gillring filed the contract as a rate schedule under § 4 of the Act, now 15 U.S.C.A. § 717c (1976). In 1959, the contract rates went into effect under § 4(e) subject to refund if the Commission should eventually find they were above the just and reasonable price. Gillring's contract then became part of the Texas Gulf Coast Area rate proceeding, which the Commission completed in 1971 by issuing Opinions No. 595 and 595-A. The D.C. Circuit affirmed them in 1975.

Two aspects of Opinion No. 595 are particularly important to an understanding of Gillring's claim in this case.

[1] First, by examining average costs of production and making an allowance for a reasonable return to investors, the Commission set ceilings on the prices producers could charge for gas in the area. For Gillring the applicable ceiling prices were 15 cents/mcf from 1959–1964, 17 cents/mcf from 1965–1967, and 19 cents/mcf from 1968–1971. Although in regulatory argot these prices are often referred to as the just and reasonable "rates," it is necessary to realize that "rate" is only a "term used, for convenience, to identify the ceilings put on producers." *Public Service Commission* v. *FPC,* 159 U.S.App.D.C. 172, 179, 487 F.2d 1043, 1051 (1973), *judgment vacated on other grounds,* 417 U.S. 964, 94 S.Ct. 3167, 41 L.Ed.2d 1136 (1974). The Commission's decision to set only a ceiling on price is grounded in the assumption that the bargain originally thought fair by the parties should not be disturbed unless harmful to consumers. As the Supreme Court emphasized in *Permian:*

> The regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of agreements only in circumstances of unequivocal public necessity.

390 U.S. at 822, 88 S.Ct. at 1388. While in some circumstances the Commission has aided producers by including a minimum, or "floor" rate in an area order, *see e.g., Permian,* 390 U.S. at 821, 88 S.Ct. 1344, it did not do so in Opinion No. 595.

Second, the Commission held that producers who had charged in excess of the ceiling rates must pay refunds, unless they "worked off" those obligations by new dedications of gas to the interstate market by January 1, 1976. *Cf. Mobil Oil Corp.* v. *FPC,* 417 U.S. 283, 299 n.18, 94 S.Ct. 2328, 41 L.Ed.2d 72 (1974) (describing similar work off provision in another area rate). The language providing the basis for computing refunds is the subject of dispute. The opinion's ordering paragraphs said:

> (B) . . . [W]ith respect to the rates involved in Section 4(e) proceedings . . ., the applicable area

rate as defined in paragraph (A) above shall be effective from the date such Section 4(e) rates were collected subject to refund and *all amounts collected* under those Section 4(e) rates prior to August 1, 1971 *in excess of the applicable area rate shall be subject to refund,* plus interest at the rate specified in the respective Section 4(e) proceedings, in accordance with provisions of ordering paragraphs (D) and (E) herein; . . . .

• • • • •

(E) Refund Reports. . . . The report shall set forth the following information . . .:

• • • • •

(iii) The *difference between the total amount collected* during the period subject to refund and *the amount that would have been collected at the applicable area rate as defined herein* subject to the proviso of ordering paragraph (B).

45 F.P.C. at 720—722 (emphasis added).

Gillring, in its contract, had agreed to a price of 11.9 cents/mcf during 1959–1960, 14.8 cents/mcf during 1960, and 17.0 cents/mcf from 1970–1971. Those prices were below the Opinion No. 595 ceiling prices for 1959–1960 and 1968–1971, but were above the ceiling price for 1960–1968. Gillring took the position in its reports that paragraph (E) allowed it to reduce the $712,307.38 excess over the ceiling price for 1960–1968 by the extra amounts it would have earned had it charged the ceiling price during 1959–1960 and 1968–1971. The result would have been a refund obligation of only $390,521.80. The Commission, relying on a prior order in a similar case, *Phillips Petroleum Company,* 41 F.P.C. 415, 417 (1969), read paragraph (B) to preclude any offset, and rejected Gillring's reports. After the Courts finally affirmed Opinion No. 595, Gillring sought a declaratory order allowing the reduction. The Commission denied the request.

Interpretation of Opinion No. 595

[2] When construction of an administrative regulation is at issue, courts owe great deference to the interpretation adopted by the agency, which will be upheld if it is reasonable and consistent with the regulation. *Udall* v. *Tallman,* 380 U.S. 1, 16-18, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); *Shell Oil Co.* v. *FPC,* 491 F.2d 82, 88 (5th Cir. 1974). The court need not find that the agency's construction is the only possible one, or even the one the court might have adopted in the first instance.

Gillring's claim that Opinion No. 595 entitles it to an offset starts and finishes with the plain language of the opinion. While Gillring's interpretation has some vitality, it does not so forcefully leap from the text of Opinion No. 595 as to foreclose the Commission from rejecting it. Ordering paragraph (B) expressly limits paragraph (E), and (B) states that amounts "in excess of the applicable area rate shall be subject to refund." Furthermore, the "area rate as defined herein" in paragraph (E) is a *ceiling* rate. The ceiling rate concept is the foundation on which Opinion No. 595 is built. Gillring's interpretation imputes to the Commission an implied intent to relieve Gillring of the 1959–1960 and 1968–1971 contract rates, for which it bargained, just because its return in other years was excessive. In *Permian,* the Supreme Court rejected a variety of offsets imposed on the Commission by the Court of Appeals, which otherwise would have supported Gillring's argument here. *See* 390 U.S. at 826-827, 88 S.Ct. 1344. Surely such a dramatic shift in regulatory philosophy would have been signalled by more than ambiguous language in an ordering paragraph.

Finally, while not strictly controlling the filed rate doctrine, reflecting a statutory bias in favor of retroactive rate reductions but not retroactive rate increases, was a con-

sideration the Commission could take into account in interpreting Opinion No. 595. *See* 15 U.S.C.A. § 717d(a) (1976); *cf. Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 71 S.Ct. 692, 95 L.Ed. 912 (1951) (no retroactive ratemaking allowed).

Equity

[3] In ordering a refund, the Commission is to explore and give due weight to considerations of equity. *Continental Oil Co.* v. *FPC*, 378 F.2d 510, 532 (5th Cir. 1967), *cert. denied sub nom. Austral Oil Co.* v. *FPC*, 391 U.S. 917, 88 S.Ct. 1801, 20 L.Ed.2d 655 (1968). The statute allows refunds but does not require them. 15 U.S.C.A. § 717c(e). The ultimate balance of equitable consideration is committed to the Commission's discretion. *Placid Oil* v. *FPC*, 483 F.2d 880, 905 (5th Cir. 1973), *affirmed, Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 94 S.Ct. 2328, 41 L.Ed.2d 72 (1974).

Gillring asked the Commission to allow the offset on grounds of equity. To support its position, it made several claims: (1) consumers would not suffer from offset because they would pay only the "just and reasonable" ceiling rate, (2) Gillring was a small producer in need of capital, (3) Gillring would have extra funds for exploration and development to stop its declining sales, and (4) Gillring at all times collected rates below the new national minimum rate established in Opinion No. 749, *review pending sub nom. Tenneco Oil Co.* v. *FERC* (5th Cir. No. 76-2960).

[4] The Commission did not abuse its discretion in rejecting Gillring's request. A primary responsibility of the Commission is to "afford consumers a complete, permanent, and effective bond of protection from excessive rates and charges." *Atlantic Refining Co.* v. *Public Service Commission, (CATCO)*, 360 U.S. 378, 388, 79 S.Ct. 1246, 1253, 3 L.Ed.2d 1312 (1959). Gillring's suggestion that consumers

would not suffer from the refund offset defies plain arithmetic, ignores the ceiling rate concept, and flaunts the filed rate doctrine.

Also, while the Commission has excused refunds for some small producers, *see Small Producer Regulations*, Op. No. 742-A (July 27, 1976), the Commission is not required to favor small producers in every instance. Unlike the prices in Opinion No. 742-A, the rates here were not collected during a period of severe curtailment when consumers received a special benefit from the gas supplied.

Furthermore, Gillring's need for exploration and development funds has not been shown to be any different from that of other producers with declining sales. One difficulty with making allowances for exploration and development is determining whether the money will actually be spent for that purpose. The Commission's "work off" policy solved that problem by excusing the refund obligations to the extent exploration funds produced discoveries that were dedicated to interstate commerce. The Commission held that the work off procedure was sufficient to negate Gillring's equitable claim for exploration and development funds, and that judgment was within its discretion to make. The subsequent abandonment of work off in Opinion No. 699, *affirmed, Shell Oil Co.* v. *FPC*, 520 F.2d 1061 (5th Cir. 1975), *cert denied*, 426 U.S. 941, 96 S.Ct. 2661, 49 L.Ed.2d 394 (1976), does not help Gillring, for the price incentive for exploration and development under Opinion No. 699 replaced the incentive provided by work off. *See* 520 F.2d at 1082-1083. The higher price allowed by Opinion No. 699 for new gas — 50 cents/mcf — makes Gillring's equitable claim for development funds weaker, not stronger.

Finally, Gillring's complaint that the rates it charged were at all times below the 18 cents/mcf minimum rate established in Opinion No. 749 is misplaced. The Com-

mission has gone from area to national ratemaking, and the Opinion No. 749 minimum rate now applies to all gas from wells commenced before January 1, 1973. The Opinion No. 749 rate is prospective only. It does not apply to gas sold during the years in question here. Opinion No. 595, which does apply, does not contain a minimum rate. Furthermore, the Opinion No. 749 rate was designed to be an incentive to maximize production from wells whose operation would not be profitable at a lower price. That consideration has little bearing on the reasonableness of refunds for excess charges made for gas that has already been produced and sold.

The Commision concluded the Opinion No. 749 rate was "immaterial" to Gillring's refund. That judgment appears sound. While the Commision has mentioned Opinion No. 749 in excusing a refund, *Rosario Production Co.*, Op. No. 781 (Nov. 8, 1976), that case is distinguishable. There the refunds, if ordered, would have been insignificant in amount, would have gone to intrastate purchasers rather than the interstate customers, and Opinion No. 749 was only one of many factors mentioned by the Commission.

Other Relief

Gillring requested relief from its entire refund obligation and to support its position repeated its equitable assertions of hardship. The Commission rejected the request summarily. On appeal, Gillring alleges the Commission failed to articulate its reasons. Having dealt with the claims in one context, however, the Commission did not have to repeat its assessment in another.

AFFIRMED.

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

REFUNDS;
SPECIAL RELIEF

Before Commissioners: Richard L. Dunham, Chairman;
Don S. Smith,
John H. Holloman III, and
James G. Watt.

Gillring Oil Company	)	Docket Nos. RI76-128, G-19864, and RI60-441

DECLARATORY ORDER
(Issued November 29, 1976)

On May 24, 1976, Gillring Oil Company (Gillring) submitted a petition which (1) requested issuance of a declaratory order allowing it to reduce refund obligations incurred from certain of its rates which were, at times, higher than those prescribed in Opinion No. 595,[1] by offsetting against such obligations amounts by which such rates were, at times, lower than those prescribed by Opinion No. 595, or, in the alternative, (2) requested relief from the refund obligations partially or in toto on the ground that such relief will provide needed exploration and development and will relieve Gillring of financial hardship.

The sale involved is to Tennessee Gas Pipeline Company (Tennessee) from the Agua Dulce Field, Nueces County, Texas, under a July 22, 1948 contract formerly designated by the Commission as Gillring's FPC Gas Rate Schedule

[1] *Area Rate Proceeding, et al., (Texas Gulf Coast Area)*, 45 FPC 674 (1971)

No. 1.[2] On September 1, 1971, Gillring filed its initial refund report involving this sale pursuant to Paragraph (E) of Opinion No. 595. Gillring subsequently revised the report twice. The final revision was transmitted to the Commission by Gillring's letter of July 1, 1972. The gas volumes and refund amount stated therein were concurred in by Tennessee.

Gillring's revised report employed the offsetting procedure previously mentioned. From amounts collected in excess of the Opinion No. 595 area rate[3] during periods when the collected rate was in excess of the area rate, Gillring deducted amounts by which the collected rates, during other periods, were lower than the area rate. Amounts so deducted related to 3.7 million Mcf sold from November 1, 1959, to April 1, 1960, at 11.9¢ per Mcf (when the area rate was 15¢), which was never subject to refund; 5.3 million Mcf sold from April 1, 1960, to December 1, 1960, at 14.87¢ per Mcf (when the area rate was 15¢), subject to refund (which never accrued) in Docket No. G-19864; and 5 million Mcf sold from October 1, 1968, to May 3, 1971 at 17¢ per Mcf (when the area rate was 19¢), subject to refund (which never accrued) in Docket No. RI60-441. With the above offsetting, Gillring's revised refund report shows a refund due, plus interest, as of 1971, in the amount of $390,521.80. Without the offsetting, the comparable amount is $712,307.38.

[2] This rate schedule was cancelled when Gillring was issued a small producer certificate (which would cover such sale) in Docket No. CS71-683 by Commission order of September 17, 1971, effective May 2, 1971.

[3] For gas sold under contracts such as Gillring's, dated prior to January 1, 1961, the Opinion No. 595 rate is (a) 15¢ prior to January 1, 1965, (b) 17¢ from January 1, 1965, to September 30, 1968, (c) 19¢ from October 1, 1968, to September 30, 1973, and (d) 20¢ on and after October 1, 1973.

We have determined that this offsetting procedure is improper and inconsistent with Commission precedent.

Gillring maintains its position is in accord with the literal meaning and intent of Opinion No. 595, particularly Paragraph (E) thereof. Paragraph (B) of Opinion No. 595 reads as follows:

> The applicable area rate as defined . . . [in Opinion No. 595] shall be effective on and after August 1, 1971, and any amounts collected in excess thereof on or after that date shall be subject to refund plus interest at 7 percent. In addition, with respect to the rates involved in Section 4(e) proceedings set out in Appendix A, [4] the applicable area rate as defined in Paragraph (A) above, shall be effective from the date such Section 4(e) rates were collected subject to refund and all amounts collected under those Section 4(e) rates prior to August 1, 1971, in excess of the applicable area rate shall be subject to refund, plus interest at the rate specified in the respective Section 4(e) proceeding, in accordance with the provisions of ordering paragraphs (D) and (E) herein; provided, however, that with respect to such 4(e) dockets no refunds are required below the rate allowed in a final, unconditioned permanent certificate previously granted for such sale.

Paragraph (E) of Opinion No. 595 states, in pertinent part, as follows:

> Refund Reports. By August 31, 1971, refund reports shall be filed with this Commission . . . by each producer involved in one or more of the Section 4(e) proceedings set out in Appendix A and as to which refunds are required under the terms of this decision. • • • The report shall set forth . . . :
>
> (i) The rates collected during the period subject to refund, and the periods during which each rate was collected.

[4] Docket Nos. G-19864 and RI60-441 are so set out.

(ii) The volume of gas sold at each such rate.

(iii) The difference between the total amount collected during the period subject to refund and the amount that would have been collected at the applicable area rate as defined herein subject to the proviso of ordering Paragraph (B)

Thus, Paragraph (F) provides that the refund report shall utilize the difference between the rates collected during the period subject to refund and the applicable area rate, to compute refunds. When Paragraph (E) is read in conjunction with Paragraph (B), it can be seen that it has reference only to rates collected during the refund period subject to refund, i.e., those "Section 4(e) rates prior to August 1, 1971, in excess of the applicable area rate." Paragraph (B) makes it clear that only amounts collected in excess of the applicable area rates are involved. It says nothing whatever about refund amounts being offset with difference between possible lower-than-area collected rates and are rates.

This issue was raised previously by Phillips Petroleum Company (Phillips) in connection with certain of its sales covered by Opinion No. 468, *Area Rate Proceeding, Permian Basin,* 34 FPC 159 (1965) which Opinion contains refund provisions similar to those in Opinion No. 595. By letter to Phillips of December 30, 1968, in Docket No. G-11217, *et al.,* the Commission disallowed offsets to refunds of the sort sought by Gillring here and stated, in pertinent part, as follows:

> Such offsetting would allow Phillips to collect retroactively the area ceiling rate for a period during which it had not placed such higher rate in effect and would be inconsistent with the filed rate doctrine. See order issued February 2, 1967 in *Samedan Oil Corporation (Operator), et al.,* 37 FPC 267, and cases there cited, We feel that such filed rate doctrine is applicable in this case since allowing of the offset principal would have the effect of granting Phillips a retroactive rate prior to the time it actually chose to make such rate effective pursuant to Section 4(e) of the Natural Gas Act.

It should be further noted that the same position urged by Gillring here, but on a group or area basis rather than on an individual basis, was urged in the Supreme Court on review of the Opinion No. 468. *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968). The Court in upholding Opinion No. 468's refund provisions, stated at pp. 826-827:

> The Commission may, in the course of its examination of the producers' financial positions, consider the possible refund consequences of its rate-making orders; but its power to order refunds is not limited to situations in which group revenues exceed group revenue requirements . . . A rate found to be unjust and unreasonable is declared by § 4(a) to be unlawful; if the rate has been the subject of a rate schedule modification under § 4(d), the Commission is empowered by § 4(e) to order its refund. We can see no warrant, either in the Act or in the terms of the Commission's orders, now to impose any additional limitations upon the Commission's authority . . ."

Next we turn to Gillring's request for relief from all or part of its refund obligation on the ground that this would provide funds for needed exploration and development. Paragraph (G) of Opinion No. 595 provided a mechanism whereby Gillring could have reduced or eliminated its refund obligation by dedicating additional reserves to the interstate market. Gillring did not do this. Therefore, its request for relief on this basis must be denied.

Finally, Gillring requests relief on the ground of financial hardship. In this regard it states that it is a small producer; that its interstate sales have continuously declined from

approximately 8.0 BCF annually during the period from 1950 to 1960 to .9 BCF in 1975; that annual sales for 1976 will be even less than in 1975; and that costs of producing gas has increased while revenues have decreased. After careful consideration, we have determined that relief is not justified on this basis.

By order of February 23, 1976, in Docket No. AR64-2, *et al., (Area Rate Proceeding, et al., Texas Gulf Coast Area),* producers who elected to discharge Texas Gulf Coast refund obligations by additional reserve dedications but who had not done so by January 1, 1976, were ordered to refund their outstanding obligation, plus 7 percent interest effective from August 1, 1971, in accordance with Opinion No. 595, as amended. As previously noted, Gillring has not filed any documents indicating that it dedicated additional reserves to Tennessee to discharge its obligations. Accordingly, it should comply with the February 23, 1976 order.

The Commission orders:

(A) The requests of Gillring for relief from the refund obligations described in the body of this order are hereby denied.

(B) Refunds shall be made by Gillring for the gas sales described in the body of this order in accordance with the Commission's order of February 23, 1976, Docket No. AR64-2, et al. *(Area Rate Proceeding, et al., Texas Gulf Coast Area).*

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Gillring Oil Company) Docket Nos. RI76-128, G-19864, and RI60-441

ERRATA NOTICE

(January 26, 1977)

DECLARATORY ORDER

(Issued November 29, 1976)

In the next-to-last line of the first full paragraph on page 4 change "difference" to "differences".

In the last line of the same paragraph change "are" to "area".

Kenneth F. Plumb,
Secretary

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

REFUNDS
SPECIAL RELIEF

Before Commissioners: Richard L. Dunham, Chairman;
Don S. Smith,
John H. Holloman III, and
James G. Watt.

Gillring Oil Company	)	Docket Nos. RI76-128, G-19864, and RI60-441

ORDER DENYING APPLICATION FOR REHEARING

(Issued January 28, 1977)

On December 29, 1976, Gillring Oil Company (Gillring) filed an application for rehearing of the Commission's declaratory order in this proceeding issued November 29, 1976, wherein the Commission, *inter alia,* denied Gillring's request to reduce a refund obligation it incurred from certain of its rates which were, at times, higher than those prescribed in Opinion No. 595[1] by offsetting against such obligation amounts by which such rates were, at times, lower than those prescribed by Opinion No. 595.

Gillring states in its application for rehearing that the "sole reason offered by the Commission for requiring refunds of full amounts collected in excess of the area rate set in Opinion No. 595 is that a contrary result would be

[1] *Area Rate Proceeding, et al., (Texas Gulf Coast Area),* 45 FPC 674 (1971).

in effect retroactive ratemaking."[2] Gillring has misread the Commission's order. We discussed there not only Gillring's crediting proposal, but also the construction of the refund provisions of Opinion No. 595 and the equities of the situation. These reasons are adequately set forth in the November 29 order. While the Commission is not necessarily required to order refunds in every case, as Gillring points out in its application for rehearing, p. 3, it is appropriate to require refunds in the instant proceeding.

Another point made by Gillring (p. 4 of its application) is that it collected rates below the minimum rate set in Opinion No. 749[3] during the period in question. This is

[2] With regard to this point in Gillring's application (p. 3), Phillips Petroleum Company, by letter order of December 30, 1968, was not allowed to offset, for refund purposes, amounts by which certain of its rates were lower than area rates, against other amounts collected in excess of area rates. (See the order of November 29, pp. 4-5.) Upon rehearing of this letter order, *Phillips Petroleum Company, Order Denying Application for Rehearing And Granting Stay,* 41 FPC 415 (1969), the Commission stated at p. 417:

> "We recognize, of course, that Phillips would accomplish its retroactive rate increase for new gas by offsetting the higher amounts claimed against refunds due on flowing gas, rather than by overtly filing for a retroactive rate increase. Not only does the offsetting device not change the reality of the situation but it flies in the face of the Commission's determination in *Permian* that the refund obligation resulting from the collection of prices above the just and reasonable rate determined should not be reduced because less than the permissible area ceiling had been collected on other rates, 34 FPC 159, 232-233. The Supreme Court upheld this Commission determination. *Permian Basin Area Rate Cases,* 390 U.S. 747 825-827 1968."

[3] *Just And Reasonable National Rates For Sales Of Natural Gas From Wells Commenced Prior To January 1, 1973,* Docket No. R-478, issued December 31, 1975.

immaterial. The rates involved were under Opinion No. 595, long prior to Opinion No. 749, and were not in any way affected by the minimum rate prescribed in Opinion No. 749.

Gillring's application for rehearing presents no new facts or principles of law which were not fully considered by the Commission in its November 29, 1976 order, or, which having now been considered, warrant any modification of that order.

The Commission orders.

Gillring's application for rehearing, filed herein December 29, 1976, is hereby denied.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

APPENDIX D

SEC. 4 (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and, all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and

keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company[1a] or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect;[1a] and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the

[1a] Subsection 4 (e) was amended May 21, 1962 by Public Law 87-454, 87th Congress, 2d Session [S. 1595], 76 Stat. 72.

Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

Sec. 19(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission

be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C,. title 28, sec. 1254).